

- DECISION -

Claimant:
ELSTON H HARVEY

Decision No.: 1465-BR-14

Date: May 28, 2014

Appeal No.: 1323415

S.S. No.:

Employer:

L.O. No.: 65

Appellant: Claimant

Issue: Whether the claimant was able, available and actively seeking work within the meaning of the Maryland Code, Labor and Employment Article, Title 8 Section 903.

- NOTICE OF RIGHT OF APPEAL TO COURT -

You may file an appeal from this decision in the Circuit Court for Baltimore City or one of the Circuit Courts in a county in Maryland. The court rules about how to file the appeal can be found in many public libraries, in the Maryland Rules of Procedure, Title 7, Chapter 200.

The period for filing an appeal expires: June 27, 2014

REVIEW OF THE RECORD

After a review on the record, the Board makes the following findings of fact and reverses the hearing examiner's decision.

The claimant opened his claim for unemployment insurance benefits and established a benefit year beginning June 16, 2013. The *Notice of Benefit Determination* was mailed to the parties in this matter. The determination had an appeal deadline of July 30, 2013. The claimant's appeal was timely filed.

Beginning May 30, 2013, the claimant was restricted from any bricklaying work for three months. The claimant had a broken finger. The claimant had no other restrictions on his ability to work.

The claimant was able to work, available for work and actively seeking work as of the week beginning June 16, 2013.

The General Assembly declared that, in its considered judgment, the public good and the general welfare of the citizens of the State required the enactment of the Unemployment Insurance Law, under the police powers of the State, for the compulsory setting aside of unemployment reserves to be used for the benefit of individuals unemployed through no fault of their own. *Md. Code Ann., Lab. & Empl. Art., § 8-102(c)*. Unemployment compensation laws are to be read liberally in favor of eligibility, and disqualification provisions are to be strictly construed. *Sinai Hosp. of Baltimore v. Dept. of Empl. & Training, 309 Md. 28 (1987)*.

The Board reviews the record *de novo* and may affirm, modify, or reverse the findings of fact or conclusions of law of the hearing examiner on the basis of evidence submitted to the hearing examiner or evidence that the Board may direct to be taken. *Md. Code Ann., Lab. & Empl. Art., § 8-510(d)*. The Board fully inquires into the facts of each particular case. *COMAR 09.32.06.02(E)*.

The claimant has the burden of demonstrating by a preponderance of the evidence that he is able, available and actively seeking work. *Md. Code Ann., Lab. & Empl. Art., § 8-903*. A claimant may not impose conditions and limitations on his willingness to work and still be available as the statute requires. *Robinson v. Md. Empl. Sec. Bd, 202 Md. 515, 519 (1953)*. A denial of unemployment insurance benefits is warranted if the evidence supports a finding that the claimant was unavailable for work. *Md. Empl. Sec. Bd. v. Poorbaugh, 195 Md. 197, 198 (1950)*; compare *Laurel Racing Ass'n Ltd. P'shp v. Babendreier, 146 Md. App. 1, 21 (2002)*.

A claimant should actively seek work in those fields in which he is most likely to obtain employment. *Goldman v. Allen's Auto Supply, 1123-BR-82*; also see and compare *Laurel Racing Ass'n Ltd. P'shp v. Babendreier, 146 Md. App. 1 (2002)*.

The term "available for work" as used in § 8-903 means, among other things, a general willingness to work demonstrated by an active and reasonable search to obtain work. *Plaughter v. Preston Trucking, 279-BH-84*. A claimant need not make herself available to a specific employer, particularly when the employer cannot guarantee her work, in order to be available as the statute requires. *Laurel Racing Ass'n Ltd. P'shp v. Babendreier, 146 Md. App. 1, 22 (2002)*.

Section 8-903 provides that a claimant must be able to work, available to work, and actively seeking work in each week for which benefits are claimed.

The benefit determination issued in this matter disqualified the claimant from receiving unemployment insurance benefits finding that the claimant was not able to work as of the week beginning June 16, 2013. The hearing examiner affirmed the benefit determination. The Board finds that the facts of this case do not support that conclusion. The medical documentation entered into evidence only restricted the

claimant from working as a bricklayer for three months beginning May 30, 2013. *See Claimant's Exhibit I.* The claimant had no other restriction on his ability to work. The Maryland Unemployment Law does not require a claimant to be able to work at his most recent occupation or any occupation in particular. What is required is that the claimant be able to work without any substantial restrictions. No evidence was presented to establish that the claimant was so disabled that he could not work at any employment.

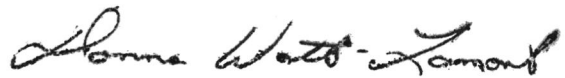
The Board notes that the hearing examiner did not offer or admit the *Agency Fact Finding Report* into evidence. The Board did not consider this document when rendering its decision.

The Board finds based upon a preponderance of the credible evidence that the claimant did not meet his burden of demonstrating that he was able, available, and actively seeking work within the meaning of *Robinson v. Md. Empl. Sec. Bd.*, 202 Md. 515 (1953) and §8-903 from the week beginning June 16, 2013. The decision shall be reversed for the reasons stated herein.

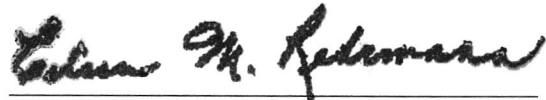
DECISION

The claimant is not able to work, available for work and actively seeking work within the meaning of Maryland Code Annotated, Labor and Employment Article, Title 8, Section 903. Benefits are allowed from the week beginning June 16, 2013.

The Hearing Examiner's decision is reversed.



Donna Watts-Lamont, Chairperson



Eileen M. Rehrmann, Associate Member

VD

Copies mailed to:

ELSTON H. HARVEY

SUSAN BASS DLLR

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

ELSTON H HARVEY

SSN #

Claimant

Employer/Agency

Before the:

**Maryland Department of Labor,
Licensing and Regulation**

Division of Appeals

1100 North Eutaw Street

Room 511

Baltimore, MD 21201

(410) 767-2421

Appeal Number: 1323415

Appellant: Claimant

Local Office : 65 / SALISBURY

CLAIM CENTER

February 20, 2014

For the Claimant: PRESENT

For the Employer:

For the Agency:

ISSUE(S)

Whether the claimant is able, available for work and actively seeking work within the meaning of the MD Code Annotated, Labor and Employment Article, Title 8 Sections 903 and 904; and/or whether the claimant is entitled to sick claim benefits within the meaning of Section 8-907. Whether the appeal should be reopened pursuant to COMAR 09.32.11.02O.

PREAMBLE

As the hearing started on February 3, 2014, it was noticed that when this matter was reset, pursuant to the Board of Appeals remand of October 15, 2013, the timeliness issue was missing from the newly issued hearing notice for the February 3, 2014 hearing. The claimant waived his right, on the record, to receive notice for the timeliness issue for the February 3, 2014 hearing.

On the hearing notice, the "ISSUES" section indicates that an issue associated with the present matter is whether the case should be reopened pursuant to COMAR 09.32.06.02N. Because the reopening issue has previously been resolved in the appellant's favor, that issue shall not be re-adjudicated here.

FINDINGS OF FACT

A Notice of Benefit Determination was mailed to the parties in this case. The determination had an appeal deadline of July 30, 2013. In this case, the appeal was filed on July 30, 2013. *See* Agency Exhibit No. 1. The claimant filed a timely appeal.

The Claimant filed for unemployment insurance benefits establishing a benefit year effective June 16, 2013 with a weekly benefit amount of \$402.00.

The claimant has been able to work since August 30, 2013. He provided medical documentation attesting to this release to work. (Claimant's Exhibit No. 1) He has been otherwise available for full-time work and actively seeking work in the bricklayer and concrete fields.

CONCLUSIONS OF LAW

Md. Code Ann., Labor & Emp. Article, Section 8-806(e) provides, in essence, that either a claimant or employer has 15 days after the date of the mailing of the benefit determination to file a timely appeal. COMAR 09.32.06.01(B) provides that an appeal is considered filed on the earlier of the following: (a) the date that is delivered in person to any office of the Department of Labor, Licensing and Regulation ("DLLR") that accepts appeals, or (b) the date on which it is postmarked by the U. S. Postal Service. Appeals filed after that date shall be deemed late and the determination shall be final, unless the appealing party meets the burden of demonstrating good cause for late filing. COMAR 09.32.06.01B(3) provides that "the period for filing an appeal from the Claims Specialist's determination may be extended by the Hearing Examiner for good cause shown." Good cause means due diligence in filing the appeal. Francois v. Alberti Van & Storage Co., 285 Md. 663 (1979) and Matthew Bender & Co. v. Comptroller of the Treasury, 67 Md. App. 693, 509 A.2d 702 (1986).

There is rebuttable presumption in law that a letter properly posted will be delivered to the address in due course. Border v. Grooms, 267 Md. 100 (1972).

Md. Code Ann., Labor of Emp. Article, Section 8-903 provides that a claimant for unemployment insurance benefits shall be (1) able to work; (2) available for work; and (3) actively seeking work. In Robinson v. Maryland Employment Sec. Bd., 202 Md. 515, 97 A.2d 300 (1953), the Court of Appeals held that a claimant may not impose restrictions upon his or her willingness to work and still be available as the statute requires.

EVALUATION OF EVIDENCE

The Hearing Examiner considered all of the testimony and evidence of record in reaching this decision. Where the evidence was in conflict, the Hearing Examiner decided the facts on the credible evidence as determined by the Hearing Examiner.

In the instant case, the claimant filed a timely appeal. He credibly testified he turned in a timely appeal. The letter of appeal has no date on it and the claimant was deemed to be credible. (Agency Exhibit No. 1)

The claimant presented medical documentation attesting to the fact that he has been able to work since

August 30, 2013. (Claimant's Exhibit No. 1) In addition he also established that he has been available to work and actively seeking work since August 30, 2013.

DECISION

IT IS HELD THAT the appellant filed a timely appeal within the meaning and intent of Md. Code, Ann., Labor & Emp. Article, Section 8-806(e), thus allowing the Hearing Examiner to reach and rule upon the substantive issues in this case.

IT IS FURTHER HELD THAT the claimant was not able to work from June 16, 2013 through August 29, 2013. Benefits are therefore denied for this time frame as he was not able, available and actively seeking work.

IT IS ALSO FURTHER HELD THAT the claimant has been able, available and actively seeking work within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-903. Benefits from the week beginning September 1, 2013, provided that the claimant meets the other eligibility requirements of the Maryland Unemployment Insurance Law. The claimant may contact Claimant Information Service concerning the other eligibility requirements of the law at ui@dllr.state.md.us or call 410-949-0022 from the Baltimore region, or 1-800-827-4839 from outside the Baltimore area. Deaf claimants with TTY may contact Client Information Service at 410-767-2727, or outside the Baltimore area at 1-800-827-4400.

The determination of the Claims Specialist is modified.



W. Rosselli, Esq.
Hearing Examiner

Notice of Right to Request Waiver of Overpayment

The Department of Labor, Licensing and Regulation may seek recovery of any overpayment received by the Claimant. Pursuant to Section 8-809 of the Labor and Employment Article of the Annotated Code of Maryland, and Code of Maryland Regulations 09.32.07.01 through 09.32.07.09, the Claimant has a right to request a waiver of recovery of this overpayment. This request may be made by contacting Overpayment Recoveries Unit at 410-767-2404. If this request is made, the Claimant is entitled to a hearing on this issue.

A request for waiver of recovery of overpayment does not act as an appeal of this decision.

Esto es un documento legal importante que decide si usted recibirá los beneficios del seguro del desempleo. Si usted disiente de lo que fue decidido, usted tiene un tiempo limitado a apelar esta decisión. Si usted no entiende cómo apelar, usted puede contactar (301) 313-8000 para una explicación.

Notice of Right of Further Appeal

This is a final decision of the Lower Appeals Division. Any party who disagrees with this decision may request a further appeal either in person, by facsimile or by mail with the Board of Appeals. Under COMAR 09.32.06.01A (1) appeals may not be filed by e-mail. Your appeal must be filed by March 07, 2014. You may file your request for further appeal in person at or by mail to the following address:

Board of Appeals
1100 North Eutaw Street
Room 515
Baltimore, Maryland 21201
Fax 410-767-2787
Phone 410-767-2781

NOTE: Appeals filed by mail are considered timely on the date of the U.S. Postal Service postmark.

Date of hearing: February 03, 2014
AEH/Specialist ID: USB7A
Seq No: 001
Copies mailed on February 20, 2014 to:

ELSTON H. HARVEY
LOCAL OFFICE #65